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Nos. 906 and 907

In the Supreme Court of the United States

OCTOBER TERM, 1959

MATSON NAVIGATION COMPANY, PETITIONER

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, ET AL.

FEDERAL MARITIME BOARD, ET AL., PETITIONERS

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Bd. 27–31)[1] is

[1] "Bd. ——" refers to the petition for certiorari filed by the Federal Maritime Board, et al. in No. 907, and "Mat. ——" to the petition of Matson Navigation Company in No. 906.

reported at 275 F. 2d 184. No opinion was rendered by the district court. The opinion of the Federal Maritime Board and Maritime Administrator ("the Board") (J.A. 1–21) [2] is reported at 5 F.M.B.-M.A. 287.

JURISDICTION

The judgment of the court of appeals (Bd. 33) was entered on February 4, 1960. The petitions for writs of certiorari were filed on May 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 805(a) of the Merchant Marine Act, 1936, prohibits a subsidized water carrier from operating in the coastwise service without permission of the Federal Maritime Board. The Board cannot grant such permission if it finds (1) that the grant will result in "unfair competition" to unsubsidized domestic carriers, or (2) that it would be "prejudicial to the objects and policy" of the Act. The following questions are presented:

1. Whether a Board order denying such permission is subject to judicial review.

2. Whether the Board's holding that competition by a subsidized carrier is "unfair" merely because it will divert from an unsubsidized domestic carrier traffic that the latter "needs" and serves adequately, without regard to whether there would be any diversion of

[2] The printed record in the court below consisted of the Joint Appendix used in the No. 14,007, *Pacific Far East Line* v. *United States*, 25[illegible] 2d 182 (C.A.D.C.), certiorari denied, 358 U.S. 866, referred to herein as "J.A. ——", and a new joint appendix in the instant appeals, case Nos. 15,085 and 15,[illegible]6 in the court below, cited here as "J.A.S. ——".

subsidy to domestic operations, misconstrued the standard of "unfair competition".

3. Whether the court of appeals correctly held that the Board's finding that a subsidized carrier's proposed unsubsidized domestic service would be "prejudicial to the objects and policy" of the Act—

a. lacked adequate supporting basis upon which the court could determine its validity; and

b. was also invalid because the Board had not considered the public interest in ending the monopoly which the unsubsidized carrier had in the trade.

STATUTES INVOLVED

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), and the pertinent provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Section 805(a) of the Merchant Marine Act, 1936 (*infra*, pp. 15–16) prohibits a subsidized water carrier from engaging in the domestic intercoastal or coastwise service without the written permission of the Board; and it provides that the Board shall not grant such permission if it finds that the grant (1) will result in unfair competition to any person operating exclusively in the coastwise or intercoastal service, or (2) would be "prejudicial to the objects and policy" of the Act.

Pacific Far East Line, Inc. ("PFEL") operates a subsidized service between California ports and the

Far East, and an unsubsidized service between such ports and Guam (J.A. 5). In December 1954 it sought permission from the Board under Section 805(a) to operate an unsubsidized Pacific Coast-Hawaii service (J.A. 3). Matson Navigation Company ("Matson"), an unsubsidized carrier in the Pacific Coast-Hawaii trade for 73 years,[1] opposed the application. Matson is closely interlocked with major sugar, pineapple and other important economic interests in the Hawaiian Islands, and carries 98% of the cargo in the trade to and from the Islands (J.A. 20, 24–26).

After a lengthy hearing, the examiner recommended that the application be granted (J.A. 22–35). The Board, however, reversed and, by a two-to-one vote, denied the application (J.A. 1–21). The Board found that although PFEL competition might divert less than 10% of Matson's tonnage in the trade, "the diversion of Matson's revenues may be substantially greater" (J.A. 15); that such diversion of cargo "would seriously jeopardize Matson's replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service" (J.A. 17); and that the "record fails to show the need for services in excess of that presently provided by Matson and other existing operators" (J.A. 16). Applying the principle that "a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity

[1] Although Matson itself is unsubsidized, it operates a subsidized service to Australia through a wholly-owned subsidiary, Oceanic Steamship Co. (J.A. 9–10).

to carry, and to which they are fundamentally entitled" (J.A. 16–17), the Board concluded (J.A. 17) that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the purposes and policy of the Act."

PFEL sought review of the Board's order in the district court, under Section 10 (a) and (b) of the Administrative Procedure Act, 5 U.S.C. 1009 (a) and (b).[4] Pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, the United States was granted leave to intervene as a party plaintiff to urge that the Board's order should be reversed (J.A.S. 22, 25). The Board and intervening defendant Matson moved for dismissal for lack of jurisdiction or, in the alternative, for summary judgment; PFEL moved for summary judgment setting aside the Board's order. After oral argument on these various motions, the district court, ruling from the bench without opinion, granted the defendants' motion for summary judgment (J.A.S. 36).

The court of appeals unanimously reversed. It held that the district court had jurisdiction of the suit under Section 10 of the Administrative Procedure Act (Bd. 30). It set aside the Board's conclusion of unfair competition. It stated that the Board had "not [found], and the evidence does not show, that PFEL

[4] At the same time, PFEL filed a petition seeking review of this same order in the Court of Appeals for the District of Columbia Circuit. This was dismissed for want of jurisdiction. *Pacific Far East Line* v. *United States*, 255 F. 2d 182 (C.A.D.C.), certiorari denied, 358 U.S. 866.

would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade" (*ibid.*); that the Board, in effect, "equated unfair competition with effective competition" (Bd. 31); that although Congress "plainly" intended to prevent "diversion of money to unsubsidized domestic operations from subsidized foreign operations * * * Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL" (*ibid.*); and that the adequacy of Matson's service and Matson's need for the traffic had "nothing to do with the question whether PFEL's competition with Matson would be 'unfair' " (*ibid*).

The court of appeals further held that the Board had disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policies of the Act," and that in resolving this issue, the Board must consider "the public interest in ending [Matson's] monopoly" (Bd. 32). Accordingly, it remanded the case to the Board with directions to "make the basis of its action reasonably clear" with respect to whether PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act" (*ibid.*).

ARGUMENT

1. Petitioners contend (Bd. 9–12; Mat. 7–10) that the Board's denial of PFEL's Section 805(a) application is not subject to judicial review because such action is committed by law to agency discretion. But, as the court below pointed out (Bd. 30), the Act "does not preclude judicial review [nor] commit the

Board's action to the Board's discretion." See Section 10 (a), (c), Administrative Procedure Act, 5 U.S.C. 1009 (a), (c); *Heikkila* v. *Barber*, 345 U.S. 229, 232–233; *Dismuke* v. *United States*, 297 U.S. 167.[5] The Board's action under Section 805(a) is closely analogous to the traditional adjudicatory licensing function; the Board is to grant the application unless it finds that a grant would result in "unfair competition" to a specified class or would be "prejudicial to the [Act's] objects and policy," and it is required to afford a hearing to the applicant and the intervenors. Here, as in *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 183, "[t]he nature of the determination points to the propriety of judicial review." Review is not being sought of an inherently discretionary type of function such as the award of a subsidy or loan,[6] but rather of the application of statutory criteria to the facts of a particular case. This Court has made clear the availability of review in such circumstances. See, *e.g.*, *Stark* v. *Wickard*,

[5] As the court below correctly stated (Bd. 30), nothing in the legislative history of the Act indicates non-reviewability. Indeed, where Congress in the Act wished to preclude judicial review or to commit action to agency discretion, it did so in specific terms. See, *e.g.*, Sections 608, 804, 46 U.S.C. 1178, 1222.

[6] Petitioners suggest (Bd. 9–11; Mat. 7–9) that the case turns on a "fundamental condition" attached to PFEL's subsidy contract and involves the question of the reviewability of the Board's administration of these subsidy contracts. But the PFEL subsidy contract simply contains a standard provision that PFEL will not engage in domestic service "without the permission * * * granted pursuant to section 805(a) * * *" (J.A. 548).

321 U.S. 288; *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441.

Petitioners argue (Bd. 10–11; Mat. 9) that PFEL is not "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute * * *", as required by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a). But unlike the cases petitioners cite (Bd. 11; Mat. 9), here the statute gives PFEL the "legal right" to operate in the domestic trade unless the Board finds that such operation will result in the proscribed unfair competition or be prejudicial to the statutory objects and policy. Clearly, PFEL is "adversely affected in fact by agency action * * *" (S. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276) and suffers "legal wrong" within the meaning of Section 10(a) (see *id.* at pp. 212, 276, 308–311, 325) when it is denied permission to enter the domestic shipping trade because of the Board's erroneous construction of the statutory criteria. See *Leedom* v. *Kyne*, 358 U.S. 184, 188–191, 201 (dissenting opinion); *Stark* v. *Wickard*, *supra*.[7]

[7] Matson's claim (Mat. 9–10) that the case should have been heard by a three-judge district court was properly rejected by the courts below. Matson asserts (n. 3, p. 10) that Section 31 of the Shipping Act of 1916, which requires such a three-judge court, "is applicable to Board action under later statutes." It relies on the fact that the Review Act of 1950, 5 U.S.C. 1032, refers to Board orders "entered under authority of the Shipping Act, 1916, as amended, *and the Intercoastal Shipping Act, 1933*, as amended, as are now subject to judicial review pursuant to the provisions of Section [31] * * *" (emphasis supplied). But the reason that the 1950 Act referred to the Intercoastal Shipping Act, 1933, was that Section 5 of that Act, 47 Stat. 1427, expressly makes the provisions of the Shipping

2. The court of appeals correctly held that the Board has misconstrued the standard of unfair competition in Section 805(a). The Board concededly has equated the standard of "unfair competition" to "an adequacy of service test" (Bd. 18). Under its view, a subsidized carrier competes unfairly with an exclusively domestic carrier unless the latter is not rendering adequate service or does not "need" the cargo which would be diverted (J.A. 17). As the court below stated (Bd. 30–31), the Board "did not find * * * that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade", but simply "equated unfair competition with effective competition." The Board's interpretation runs coun-

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Act of 1916 "applicable to common carriers by water in intercoastal commerce." There is no similar provision in the Merchant Marine Act, 1936. Moreover, the legislative history of the Judicial Review Act of 1950 makes clear that it was "directed at dispensing with the cumbersome three judge court procedure * * *" (*D. L. Piazza Co.* v. *West Coast Line*, 210 F. 2d 947, 949 (C.A. 2), certiorari denied, 348 U.S. 839) to the extent that such procedure was applicable to certain orders of the specified agencies, including Board orders under the 1916 and 1933 Acts. See H. Rept. No. 2122, 81st Cong., 2d Sess., pp. 1, 2, 4; S. Rept. No. 2618, 81st Cong., 2d Sess., pp. 1–2, 5. In any event, the fact that this question has not previously arisen since the enactment of the 1936 Act shows that it is not a matter of substantial importance.

Matson also challenges (Mat. 3) the district court's permitting the United States to intervene. But since Matson did not cross appeal on this issue, it cannot now raise it. *Bolles* v. *Outing*, 175 U.S. 262. In any event, Matson has failed to show that the district court abused its discretion in granting intervention. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524–525; *Allen Calculators, Inc.*, v. *National Cash Register Co.*, 322 U.S. 137, 142.

ter to the plain meaning of the statute and its legislative history. If Congress had intended to adopt an adequacy of service standard (with which it was, of course, familiar), it would have done so, instead of employing the completely different language of unfair competition.

The legislative history shows that Section 805(a) was aimed at correcting the abuses that had developed under the Merchant Marine Act of 1928 (45 Stat. 689), whereby extensive subsidies paid to operators in foreign commerce (in the form of mail pay contracts) were diverted into domestic operations. There were frequent references to the fact that such diversion constitutes "unfair competition with unsubsidized American lines * * *" in the same trade. H. Rept. No. 1277, 74th Cong., 1st Sess., p. 35; see, also, S. Rept. No. 898, 74th Cong., 1st Sess., pp. 14–15, 42–44; H. Doc. No. 418, 74th Cong., 1st Sess., pp. 11, 18. Despite support for the view that no subsidy should be paid to any carriers engaged in any domestic operations (see, *e.g.*, 79 Cong. Rec. 6499; Hearings on S. 3500, 74th Cong., 2d Sess., p. 126; H.R. 7854, H.R. 7981, 74th Cong., 1st Sess.), Congress refused to include such a blanket prohibition in the Act. Instead, it prohibited subsidized carriers from competing with domestic operators only if such competition was found to be "unfair," or the entry of the subsidized carrier into the domestic service would be prejudicial to the objects and policy of the Act. This legislative history[8] indicates that the competition which Congress

[8] Significantly, there is no reference in the legislative history to "need", "capacity", "fundamentally entitled," or "adequacy."

condemned as "unfair" in Section 805(a) is that of a subsidized operator gaining an unfair advantage over an unsubsidized carrier by diverting foreign subsidy moneys into domestic operations.

The fact that the second paragraph of the section makes it a misdemeanor to divert any subsidy to domestic operations after the Board has granted an application does not mean, as the Board contends (Bd. 19), that Congress did not make diversion the standard of unfair competition in the first paragraph. On the contrary, the second paragraph was obviously designed (1) to insure that carriers which receive Section 805(a) authority do not thereafter divert subsidy moneys into domestic operations and (2) to protect against more subtle forms of diversion (see H. Doc. No. 118, *supra*, at p. 18) which it might be difficult to discover at the administrative hearing. Indeed, the fact that subsequent subsidy diversion is specifically made illegal is a further indication that the competition which Congress condemned as "unfair" is that which involves such diversion.

Petitioners further rely (Bd. 14–15; Mat. 10–11) on the Board's "consistent" interpretation "that Section 805(a) warrants permission only where the exclusively domestic services are inadequate * * *" (Bd. 14). But this interpretation of "unfair competition" was not enunciated until 1951, 15 years after passage of the Act. In view of the plain meaning of the statute and its legislative history (see *supra*, pp. 9–11), we submit that the Board's recent contrary interpretation is not entitled to any significant weight. Cf. *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499–500.

3. The court of appeals held (Bd. 32) that the Board "has disclosed no basis for its finding that PFEL's entry into the trade would be 'prejudicial to the objects and policy of the Act.'" However, the court did not reverse that finding, but merely remanded the case to the Board "so that it may reconsider this finding and clarify it if it is retained" (*ibid.*). Since there has thus been no final determination whether the PFEL application is consistent with the statutory objects and policy, there is no occasion for review of that issue at this time.

The court below was clearly correct in ruling that the Board had failed to disclose the basis for its finding that grant of PFEL's application would be "prejudicial to the objects and policy" of the Act. The Board did not explain what objects and policy would be prejudiced, or in what respects.[9] It merely concluded, upon the same findings on which it based its holding of unfair competition, that the grant would also violate the prejudice standard. In the circumstances, the court of appeals was fully warranted in requiring the Board to clarify the basis of its ruling; in any event, its action does not warrant review by this Court.

As the court ruled, the Board, in determining whether entry of PFEL into the trade would be consistent with the statutory objects and policy, was required to consider "the public interest in ending" (Bd. 32) Matson's "virtual monopoly in carriage of cargoes moving between the Pacific Coast and

[9] The objects of the Act are set out in § 210 (46 U.S.C. 1120), and the policy in § 101 (46 U.S.C. 901).

Hawaii" (dissenting opinion, J.A. 20).[10] Among the policies of the Merchant Marine Act, 1936, is that "the United States shall have a merchant marine * * * sufficient to carry its domestic water-borne commerce; * * * capable of serving as a naval and military auxiliary in time of war or national emergency * * * [and] composed of the best-equipped, safest, and most suitable types of vessels * * *" (46 U.S.C.A. 1101). Providing competition to a monopoly such as Matson's "unquestionably has bearing on the achievement" (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87) of that policy. Of course, the weight to be attached to the competitive factor is primarily for the Board. But the Board cannot completely ignore this factor merely because PFEL is a subsidized carrier. For PFEL proposed to operate an unsubsidized service, and "the public interest in ending" (Bd. 32). Matson's monopoly is one factor that the Board must consider in evaluating the effect of the proposal upon the broad statutory objects and policy. Cf. *McLean*, at pp. 79–88; *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (C.A.D.C.).

[10] The examiner made detailed findings as to the interlocking ownership and affiliation between Matson and the major shipping interests in Hawaii (*e.g.*, sugar, molasses, pineapple, lumber) (Rec. Dec. 7–10, J.A. 24–25). He further found that Matson carries all the sugar, molasses, and pineapple cargo bound for the United States (which represents about 95% of the cargo moving from Hawaii to the Pacific Coast) (J.A. 24). Using the statistics for the last year of record in the hearing (1954), Matson carried 98% of all Hawaii-bound cargoes, and 99% of all cargoes to the United States (J.A. 24). These findings, although essentially undisputed, were nevertheless deleted by the Board without explanation.

Contrary to the Board's sweeping claims (Bd. 12–16), the court below has not "devitalized" Section 805 (a) nor in any way suggested that the Board, under the "objects and policy" standard, cannot act to maintain "a strong domestic fleet" in the national defense and interest. The Board clearly has wide discretion to consider the many factors that may bear on the objects and policy of the Act, including the need of carriers for adequate revenue and the necessity to maintain and replace outworn vessels. The court of appeals has simply specified that the Board, in exercising its discretion, must adequately explain the basis of its judgment and must take into account all relevant factors. *Cf. American Trucking Assns.* v. *United States*, 326 U.S. 77, 86; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and this case presents no question warranting review by this Court. The petitions for writs of certiorari should be denied.

Respectfully submitted.

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JUNE 1960.

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171–1182 of this title, or to charter any vessel to any person under section 1191–1206 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route

or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation; except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, provides in pertinent part:

Except so far as (1) statutes preclude prejudicial review or (2) agency action is by law committed to agency discretion:

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent juris-

diction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

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